No. 88-6651

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MAURICE M.,

Petitioner

v.

JACQUELINE BOUKNIGHT,

Respondent

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

APPENDICES

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TABLE OF CONTENTS

	Page
Appendix A: Opinion of the Court of Appeals of Maryland in In Re: Maurice M., No. 50, September Term, 1988 (Majority Opinion 2a-23a; dissenting opinion 24a-42a)	1a
Appendix B: December 19, 1988 Judgment of the Court of Appeals of Maryland in In Re: Maurice M., No. 50, September Term, 1988	43a
Appendix C: December 19, 1988 Order of the Court of Appeals Denying Motion for Stay of Judgment	45a
Appendix D: December 21, 1988 Opinion and Order of the United States Supreme Court in Baltimore City Department of Social Services v. Bouknight, No. A-494 (Rehnquist, C.J., Circuit Justice)	46a
Appendix E: August 18, 1987 Order Protective Supervision of the Circuit Court for Baltimore City, Division for Juvenile Causes, Matter of Maurice M., Petition No. 88704202	51a
April 20, 1988 Order to Show Cause of the Circuit Court for Baltimore City, Division for Juvenile Causes, Petition No. 88704202	53a
April 28, 1988 Contempt Order of the Circuit Court for Baltimore City for Juvenile Causes, Petition No. 88704202	54a
Appendix F: Maryland Statutory and Rules Provisions	56a
Appendix G: Extracts from record below	
Medical Records, Johns Hopkins Hospital and Francis Scott Key Hospital	59a
July 27, 1987 Psychological Evaluation of Jacqueline Bouknight by Joseph M. Eisenberg, Ph.D.	65a
May 13, 1988 Baltimore City Department of Social Services Partial List of Contacts	69a

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 50

September Term, 1988

IN RE: MAURICE M.

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Blackwell,
JJ.

Opinion by Murphy, C.J.
McAuliffe, J., dissents; Rodowsky, joins in part to dissent.

Filed: December 19, 1988

This case involves a challenge on Fifth Amendment self-incrimination grounds to the constitutionality of a civil contempt order entered by a Juvenile Court directing the mother of a juvenile "to produce him before the court or to reveal his exact whereabouts."[1]

I

Maurice M., the infant son of Jacqueline Bouknight, was admitted to the hospital on January 23, 1987, with a broken leg; he was then three months old. Because of the nature of Maurice's injuries, and the presence of old, partially healed fractures, the Baltimore City Department of Social Services (DSS) obtained an authorization on February 11, 1987 to provide shelter care for the child and he was placed in foster care. DSS also filed a petition in the Circuit Court for Baltimore City (Division of Juvenile Causes), seeking a determination that Maurice was a child in need of assistance (CINA) under the provisions of Maryland Code (1984), § 3-801(e) et seq. of the Courts and

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[1]The Fifth Amendment provides, in pertinent part:

> "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . ."

This provision is applicable to the States through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 3, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

Article 22 of the Maryland Declaration of Rights is in pari materia with the Fifth Amendment provision. See Richardson v. State, 285 Md. 261, 265, 401 A.2d 1021 (1979) and Ellison v. State 310 Md. 244, 259-260, n. 4, 528 A.2d 1271 (1987).

Judicial Proceedings Article. The petition recited Maurice's history of injuries, the mother's history of emotional problems, her own former status as a CINA, the fact that she was seen to throw Maurice into his crib during his second hospitalization, that she was verbally abusive to the physicians and social workers, and that the father had just been released from prison for drug violations. At a hearing on May 19, 1987, Maurice, Jacqueline, and DSS, each represented by counsel, stipulated to the essential facts as set forth in the petition and agreed to continue Maurice under the Shelter Care Order. On July 17, 1987, this order was modified and physical custody of Maurice was returned to Jacqueline.

At a hearing on August 18, 1987, Maurice was found to be a CINA. The parties agreed that Maurice would remain in Jacqueline's custody but would be placed under an Order of Protective Supervision to DSS and a DSS aide was assigned to assist Jacqueline with parenting skills. Under this order, Jacqueline agreed to "cooperate" with DSS, and to refrain from physically punishing Maurice.

By petition filed on April 18, 1988, DSS represented that Jacqueline had failed to cooperate with DSS and that she refused to provide a current address or to inform DSS of Maurice's whereabouts. The petition also recited that Maurice's father had been shot to death the previous month and that Jacqueline now had a history of drug use. DSS also filed a Motion for Contempt against Jacqueline, alleging that DSS representatives had made a

home visit on April 7, 1988, but were told by Jacqueline that Maurice "was in the care of an aunt; however, she refused to identify the aunt or provide the whereabouts of the child."[2]

On April 20, 1988, at a hearing before a Juvenile Master, at which Jacqueline declined to appear, DSS cited Jacqueline's failure to comply with the Order of Protective Supervision and was awarded custody of Maurice. On the same day, the court (Angeletti, J.) held a hearing on the contempt motion; neither Maurice nor Jacqueline appeared at the hearing although each was represented by counsel. DSS suggested to the court that it was dealing with a "very serious abuse case" because of Maurice's prior history of injuries, and he might even be dead. The court stated its belief that the child may be "in some jeopardy because of the actions of the mother in refusing to bring him in." At the conclusion of the hearing, the court ordered Jacqueline to show cause why she should not be held in contempt for failure to produce Maurice in court.

Jacqueline was subsequently arrested and brought before the court on April 27, 1988. At that hearing, the court (Mitchell, J.) engaged Jacqueline in a colloquy in the presence of her

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[2]There was evidence that DSS representatives had not seen Maurice since September 4, 1987; that the DSS aide's efforts to see Maurice were thwarted by Jacqueline's statements that the child was not at home; and that Jacqueline had told police that Maurice was in the care of an aunt, but that the aunt had denied seeing Maurice.

attorney. It asked her "the whereabouts of . . . Maurice." In response, Jacqueline said that he was with her sister Barbara at a designated address in Dallas, Texas. Jacqueline's statement was not given under oath and no Fifth Amendment objection to the court's inquiry was entered on Jacqueline's behalf.

An immediate police investigation revealed that Jacqueline's sister had not seen Maurice. On April 28, 1988, Judge Mitchell found Jacqueline in contempt "for failing to produce [Maurice] before the court or to reveal his exact whereabouts." The order specified that Jacqueline be jailed until she purged herself of the contempt by (1) producing Maurice before the court, or (2) revealing to the court his exact whereabouts, or (3) by providing "information" about Maurice to the police, or DSS, or the court.

The court also conducted a hearing on the same day it entered its civil contempt order. At the hearing, Jacqueline's counsel told the court that Jacqueline "absolutely insists" that the child was with her sister in Texas. Counsel also told the court that Jacqueline's opportunity to purge herself was not a constitutional one "if her purging herself may involve admitting to a crime of some sort." The court, in response, said that Jacqueline was not being asked "to admit to anything"; that Jacqueline was not being asked "what has happened to the child or whether she committed any act that in anyway harmed the child"; and that the only thing that is required is that she produce Maurice. The court added that Jacqueline could purge herself of the contempt "through the means of a proper address, person, or

location for the child," i.e., by simply indicating to her counsel, "to anyone at the jail, or anyone in authority, including this Court, that information."

At yet another hearing on May 18 before Judge Mitchell, Jacqueline moved to strike the contempt order on Fifth Amendment grounds. She claimed that the substance of the contempt "is that [Jacqueline] must verbally or physically produce statements or evidence that may tend to incriminate her." The court rejected the argument, concluding that it had jurisdiction to require disclosure of "the whereabouts of the minor child" and, in doing so, Jacqueline was not required to speak.

On May 26, 1988, a further hearing was granted on the Fifth Amendment issue. Jacqueline contended that to purge herself of the contempt she must "give testimony or speak" in violation of her self-incrimination privilege; that "the product of her mind has to yield the whereabouts of Maurice[;] . . . she has to speak to someone, . . . to order some agent, through his mind, through his lips to produce Maurice." The court once again stated its view that its order to produce Maurice required only that Jacqueline perform an act -- that no testimony need be given. It said that the contempt order was issued "not because she refuses to testify . . . [but] because she has failed to abide by the Order of this Court, mainly the production of Maurice."

Jacqueline appealed. We granted certiorari prior to decision by the intermediate appellate court to consider the important issue raised in the case.

II

The Fifth Amendment privilege against self-incrimination extends "to compelling answers by parties or witnesses in civil litigation." Whitaker v. Prince George's County, 307 Md. 368, 385, 514 A.2d 4 (1986). It "protects a witness from being required to make disclosure, otherwise compellable in the trial court's contempt power, which could incriminate him in a later criminal prosecution." Id. at 385. See also In re Criminal Investigation No. 1-162, 307 Md. 674, 516 A.2d 976 (1986). The privilege "is confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). To sustain the privilege, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered, might be dangerous because injurious disclosure could result." Id. at 486-87. The protection of the Fifth Amendment "not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute" the suspected offender. Id. at 486. The privilege must be accorded a liberal construction in favor of the right that it was intended to secure. Id. See also Ellison v. State, 310 Md. 244, 528 A.2d 1271 (1987).

It is the historic function of the Fifth Amendment to protect an individual from compulsory incrimination through his own testimony. United States v. White, 322

U.S. 694, 701, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944). In Schmerber v. California, 384 U.S. 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), the Court held that the privilege protects an accused "only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." Id. at 761. The Court said that the protection of the privilege "reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." Id. at 763-64.

The question in Schmerber was whether the involuntary withdrawal of blood and the use of the analysis in a drunken driving prosecution infringed the Fifth Amendment privilege. In concluding that it did not, the Court emphasized that the privilege "is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate [the privilege]." Id. at 764. Citing prior precedents, the Court said that the privilege offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." Id. Quoting from Holt v. United States, 218 U.S. 245, 252-53, 31 S. Ct. 2, 54 L. Ed. 1021 (1910), the Court observed, id. at 763, that the privilege against self-incrimination protects an individual from being a witness against himself; it is a

prohibition "of the use of physical or moral compulsion to extort communications [from an accused], not an exclusion of his body as evidence when it may be material." Stated in other terms, "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Fisher v. United States, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976), involved a summons directing an attorney to produce documents of a client; the question was whether the documents were constitutionally immune from summons in the hands of the client and retained that immunity in the hands of the attorney. The Court concluded that the client's Fifth Amendment privilege was not violated by enforcing the summons against the lawyer since the client was not thereby compelled to be a witness against himself. It said that the constitutional privilege "does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating." Id. at 408 (emphasis in original). The Fifth Amendment, the Court emphasized, protects against "'compelled self-incrimination, not [the disclosure of] private information.'" Id. at 401, quoting from United States v. Nobles,

422 U.S. 225, 233, n.7, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975,. It observed that it is the extortion of the information from the accused that offends our sense of justice. Id. at 398. However, it continued, while a party is privileged from producing evidence, the party has no privilege from its production. Id. at 399.

At issue in United States v. Doe, 465 U.S. 605, 104 S. Ct. 1237, 79 L. Ed. 2d 552 (1984) (Doe I) was whether, and to what extent, the Fifth Amendment privilege applied to concededly incriminating business records of a sole proprietorship. There, the sole proprietor was ordered by a grand jury subpoena to produce his business records. The Court recognized that a subpoena that demands production of voluntarily prepared documents does not compel oral testimony nor require the subpoenaed party to restate or affirm the contents of the documents. Id. at 610-11. Quoting from Fisher, supra, 425 U.S. at 409-10, it observed that merely because records on their face might be incriminating would not violate the privilege since the privilege protects only against being incriminated by the individual's own compelled testimonial communications. Id. at 611. The Court said, however, that while the contents of the records may not be privileged, the act of producing the documents may be because the individual may thereby be compelled "to perform an act that may have testimonial aspects and an incriminating effect." Id. at 612. This may be so, the Court explained, because compliance with the subpoena tacitly concedes

the existence of the demanded records, their possession or control by the party under subpoena, as well as the authenticity of the records. Id. at 613. Noting the factual determination of the trial judge that "the act of producing the documents would involve testimonial self-incrimination," id. at 613-14, the Court, declining to overrule that factual determination, held that the act of producing the documents was privileged. Id. at 617.

In Doe v. United States, U.S. , 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988) (Doe II), a court order compelled the defendant, the target of a grand jury investigation, to execute consent forms authorizing foreign banks to disclose records of his accounts, without identifying the accounts or acknowledging their existence. The defendant claimed that the compelled execution of the consent forms had "independent testimonial significance" that infringed his Fifth Amendment privilege against self-incrimination. 108 S. Ct. at 2345. In concluding that the privilege was not thereby violated, the Court reviewed its earlier Fisher and Doe I cases, stating that there the issue "was whether the act of producing subpoenaed documents, not itself the making of a statement, might nonetheless have some protected testimonial aspects." Id. . In those cases, the Court concluded "that the act of production could constitute protected testimonial communication because it might entail implicit statements of fact: by producing documents in compliance

with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic." Id. . It said that the constitutional privilege "applies to acts that imply assertions of fact." Id. . The Doe II Court said that "to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information [because] [o]nly then is a person compelled to be a 'witness' against himself." Id. This understanding, the Court said, was most clearly revealed in those cases in which it had held "that certain acts, though incriminating, are not within the privilege, citing Schmerber, supra (suspect may be compelled to furnish a blood sample); Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967) (providing a handwriting exemplar); United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973) (providing a voice exemplar); United States v.Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (to stand in a lineup); and Holt v. United States, 218 U.S. 245, 31 S. Ct. 2, 54 L. Ed. 1021 (1910) (to wear particular clothing). As to these, it said that the privilege was not implicated because the suspect was not required to disclose any knowledge he might have or to speak his guilt. The privilege may be asserted "only to resist compelled explicit or implicit disclosures of incriminating information." Id. at 2348. Thus, the Court held that the defendant's execution of the consent form was without testimonial significance "because neither the form, nor its execution,

communicates any factual assertion, implicit or explicit, or conveys any information to the Government." Id. at 2350. It said that the form did not identify any particular bank, did not acknowledge that an account was in existence, or that it was controlled by the defendant. And assuming that such an account did exist, the form did not indicate whether information relating to the defendant was present at the bank. Therefore, the Court explained that it was for the Government to locate that evidence by its independent labors. Accordingly, the Court concluded that the defendant's "compelled act of executing the form has no testimonial significance" because by signing the form, the defendant "makes no statement, explicit or implicit, regarding the existence of a foreign bank account or his control over any such account [n]or would his execution of the form admit the authenticity of any records produced by the bank." Id. . The defendant's act of executing the form was, therefore, not compelled to obtain any knowledge which he possessed in violation of the Fifth Amendment privilege.

The Supreme Judicial Court of Massachusetts, in Com. v. Hughes, 380 Mass. 583 , 404 N.E.2d 1239 (1980), concluded that a court order directing the defendant in a criminal case to produce a designated gun suspected of having been used in the commission of the offense violated the defendant's Fifth Amendment privilege. There, the defendant, charged with assault with a handgun, refused to comply with the order that he produce the weapon or show present inability to do so. The gun had been

legally registered to the defendant; the prosecution wanted it for ballistics testing. After recognizing that the defendant, without uttering a sound, could comply with the order by producing the weapon, the court nevertheless held that the defendant's producing the revolver would have sufficient testimonial aspects to initiate Fifth Amendment consideration. After reviewing Schmerber and Fisher, it recognized two kinds of "testimonial assertions" that were implied in the production of the gun, i.e., (1) a tacit admission of the existence and location of the weapon in the hands of the possessor and (2) implicit authentication that the weapon was that required to be produced by the order. Id. at 1243. In finding that the defendant's privilege had been infringed, the court said, id. at 1244, that "[i]f the defendant should produce the revolver, he would be making implicitly a statement about its existence, location and control" which would be used to prove his possession and control of the weapon after the alleged crime was committed. The identical result was reached on markedly similar facts in Goldsmith v. Superior Court In & For Shasta, 199 Cal. Rptr. 366, 152 Cal. App. 3d 78 (1984).

United States v. Campos-Serrano, 430 F.2d 173 (7th Cir. 1970) involved a criminal charge of knowing possession of a forged alien registration card. There, because the defendant had been coerced into producing the card during a custodial interrogation, the court found a violation of the privilege against self-incrimination, reasoning that the defendant's act of

compelled production implicitly admitted the card's existence, location, and the defendant's control over it. The court said: "An individual should not be compelled to produce the crime itself." Id. at 176. In State v. Dennis, 16 Wash. App. 417, 558 P.2d 297 (1976), the defendant was convicted of possessing cocaine. The police coerced the defendant into producing bags of the illegal drug. The court found a violation of the Fifth Amendment privilege because the act of production virtually admitted the defendant's control. In State v. Alexander, 281 N.W.2d 349 (Minn. 1979), the court reversed a contempt adjudication which had been based on the defendant's failure to produce film which allegedly was possessed in violation of a criminal obscenity statute. The court concluded that the act of production was tantamount to an admission of the defendant's control or possession of the film.

III

As earlier observed, Maurice is a CINA whose custody has been awarded to the DSS. In response to the court's directive that Bouknight release Maurice to DSS, she has refused to do so, insisting that he is with her sister in Texas, information which has proven to be incorrect. The State readily acknowledges that it is fearful that Maurice has been criminally abused or possibly is dead. In the circumstances, as disclosed by the record, the State concedes that Bouknight has a reasonable apprehension that she will be prosecuted if, in complying with the court's order,

she produces Maurice in court or otherwise discloses his whereabouts to the authorities.

The State is, of course, mandated to protect Maurice as a CINA under the Juvenile Causes Act, Code (1984 Repl. Vol.) § 4-101, et. seq. of the Courts and Judicial Proceedings Article. That it does not know of Maurice's present whereabouts is equally clear. To purge the contempt order and thereby free herself from imprisonment, Bouknight must impart information to someone sufficient to permit Maurice to be produced in court, or provide information of his present whereabouts. Should she do so, Bouknight will necessarily admit a measure of continuing control and dominion over Maurice's person. In these circumstances, if the information discloses that Maurice is now dead, or has been subject to criminal abuse, as the prosecution candidly fears, suspicion concededly would focus on Bouknight as the criminal agent. By disclosing the demanded information, therefore, Bouknight would, in the event a crime had been committed upon Maurice's person, be incriminating herself by, in effect, disclosing the corpus delicti itself under compulsion of the court's order.[3]

In the circumstances of this case, the compelled act of producing Maurice in court, although not requiring Bouknight to

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[3]Section 3-831 of the Courts Article suggests that Bouknight's refusal to relinquish Maurice's custody to DSS is itself a crime, punishable by imprisonment up to three years.

utter a sound, or compelling her to verbally disclose Maurice's whereabouts, is implicitly at the least a testimonial communication within the contemplation of the Fifth Amendment privilege, as explicated by the controlling case law. Either by the act of producing Maurice in court, or verbally disclosing his whereabouts, Bouknight is compelled to communicate facts. We therefore find that the court's contempt order is, in its entirety, violative of Bouknight's Fifth Amendment privilege and must be vacated.

(A)

In so concluding, we have considered the State's argument that Bouknight waived her Fifth Amendment privilege by providing information to the court as to Maurice's presence at a designated address in Texas. When she made the statement to the court, Bouknight was not a witness and she was not under oath. Although represented by counsel at the time, the record does not disclose that Bouknight was informed by counsel or the court of her right to remain silent in the face of the court's inquiry. Moreover, Bouknight's inaccurate information concerning Maurice's whereabouts was not directly incriminating; indeed, it was likely intended to exculpate her from further inquiry by the court.

Waiver of a constitutional protection is "an intentional relinquishment or abandonment of a known right or privilege."

Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). It is difficult to establish and cannot be inferred from a silent record. Barker v. Wingo, 407 U.S. 514, 525-26, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). To be valid, the waiver must be made knowingly, voluntarily and intelligently. Miranda v. Arizona, supra; Younie v. State, 272 Md. 233, 245, 322 A.2d 211 (1974). However, forfeiture of the Fifth Amendment privilege may be inferred from a course of conduct without any inquiry into intent. See Minnesota v. Murphy, 465 U.S. 420, 428, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984); Klein v. Harris, 667 F.2d 274 (2d Cir. 1981). The Supreme Court has held that an "individual under compulsion to make disclosures as a witness who reveal[s] information instead of claiming the privilege [loses] the benefit of the privilege." Garner v. United States, 424 U.S. 648, 653, 96 S. Ct. 1178, 47 L. Ed. 2d 370 (1976). See also United States v. Kordel, 397 U.S. 1, 7-10, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970); Adams v. State, 200 Md. 133, 144, 88 A.2d 556 (1952). Thus, if a witness "discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure." Brown v. Walker, 161 U.S. 591, 597, 16 S. Ct. 644, 40 L. Ed. 819 (1896). But the loss of such a basic constitutional guarantee is not to be lightly inferred. Emspak v. United States, 349 U.S. 190, 196, 75 S. Ct. 687, 99 L. Ed. 997 (1955); Smith v. United States, 337 U.S. 137, 150, 69 S. Ct. 1000, 93 L. Ed. 1264 (1949). A statement will not preclude a refusal to make further disclosures on Fifth Amendment grounds unless it directly inculpates the

witness and the witness could reasonably be expected to know that he might have waived the privilege. See Rogers v. United States, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951); United States v. Singer, 785 F. 2d 228 (8th Cir. 1986); Klein v. Harris, supra.

On the record before us, it is manifest that Bouknight's Fifth Amendment privilege remains intact and that her unsworn, nonincriminatory statement to the court was simply a lie. See United States v. Singer, 785 F.2d 228, 241 (8th Cir. 1986); Klein v. Harris, supra, 667 F.2d at 288; Balderas Cortez v. State, 735 S.W.2d 294, 303 (Tex. App.-Dallas 1987).

(B)

The State argues that if the Fifth Amendment applies, and the privilege has not been waived, the public right to protect its children, as manifested by the Juvenile Causes Act, outweighs Bouknight's constitutional right against self-incrimination.[4] Consequently, we are urged to strike the balance between Bouknight's right to silence, and the court's obligation to protect Maurice, in favor of the child. To do otherwise, it is said, would strip the Juvenile Court of its ability to protect any child suspected of being abused. The State points out that the court's action in holding Bouknight in contempt followed the

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[4]This question was not raised or considered at the trial. Under Md. Rule 8-131, we may nevertheless, in our discretion, decide the question for the guidance of the circuit court or to avoid the expense and delay of another appeal.

statutory prescription of § 3-814(c) of the Courts Article that if a parent "fails to bring the child before the court when requested . . . [,] [it] may proceed against the parent, for contempt." On Maurice's behalf, his counsel says that virtually every CINA case involves some allegation of abuse or neglect which is potentially subject to criminal indictment; and that to apply the constraints of the Fifth Amendment in such cases is to afford the parent "carte blanche to conceal any negative information about the child's status despite explicit court orders to cooperate with agency officials." It is further suggested that in areas where, as here, the scope of state involvement is so extensive and that all citizens are expected to accept some risk of self-incrimination, individuals can be compelled to provide incriminating information, citing by way of example mandated production of tax records, securities filings, and other potentially incriminating vital records. Reliance is placed principally upon California v. Byers, 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971) and United States v. Flores, 753 F.2d 1499 (9th Cir. 1985).

The issue in Byers was whether the constitutional privilege against compulsory self-incrimination was infringed by an essentially regulatory California statute which requires the driver of a motor vehicle involved in an accident to stop and give his name and address. The Court's plurality opinion said that "tension" exists between the State's demand for disclosures that may have an incriminating potential and the protection of

the right against self-incrimination. Id. at 427. These must be resolved, it said, "in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other." Id. It said that an organized society imposes many burdens on its constituents; it requires the filing of tax returns, that producers and distributors of consumer goods file informational reports on the manufacturing processes and the content of products, on the wages, hours, and working conditions of employees. It recognized that securities filings require informational reports and that industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Id. at 427-28. It noted that in each of these instances "there is some possibility of prosecution . . . for criminal offenses disclosed by or deriving from the information that the law compels a person to supply." Id. at 428. But, the plurality continued, the mere possibility of incrimination, rather than a substantial possibility, is insufficient to defeat the strong policy in favor of a statutory reporting requirement. Id. It said that disclosure with respect to automobile accidents did not entail a substantial risk of self-incrimination; that the California statute was not intended to facilitate criminal prosecutions but to promote satisfaction of civil liabilities arising from automobile accidents; and that consequently the self-incrimination privilege was not violated by the reporting requirement.

United States v. Flores, supra, involved a statutory

reporting requirement that written notice be given to a carrier whenever firearms were being shipped to an unlicensed person. The Court found no violation of the defendant's right against self-incrimination by reason of the reporting requirement. While recognizing that "the privilege against self-incrimination . . . may only be limited for the most substantial of reasons," id. at 1500, the Court said that the Fifth Amendment

> "does not always demand substantial undercutting of valid and essential government regulation when the means to effect that regulation necessarily include disclosure of information which could lead to self-incrimination."
> Id. at 1501 (emphasis in original).

In so holding, the Court pointed out that the statute was "directed at a universe of people," and did not operate in an area of activity "permeated with criminal statutes or directed at a group of persons inherently suspect of criminal activity." Id.

We think these cases are inapposite to the matter now before us. The State readily acknowledges that Bouknight's risk of incriminating herself is a substantial one, encompassing, among other possible crimes, the felony of child abuse and even murder. While it may be argued that the Juvenile Causes Act absolutely requires that Bouknight produce Maurice in court or provide information as to his location, and thus bears some kinship to a statutory reporting requirement, we simply are unable in the circumstances to, in effect, totally expunge Bouknight's Fifth Amendment rights where the risk of prosecution is so substantial. Assuming, arguendo, that there may be causes in which a balancing test is appropriate to determine the existence of the Fifth

Amendment privilege, we conclude that the case before us is not one of them. We accord the privilege a liberal construction, as we must, in favor of the right that it was intended to secure. Hoffman v. United States, supra, 341 U.S. at 486. While we must vacate the civil contempt order in this case, we recognize that Bouknight's conduct may be criminally punishable under § 3-831 of the Courts Article.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED; CASE REMANDED TO THAT COURT WITH DIRECTIONS TO ORDER JACQUELINE BOUKNIGHT RELEASED FROM CUSTODY. MANDATE TO ISSUE FORTHWITH; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

IN THE COURT OF APPEALS OF MARYLAND

No. 50

September Term, 1988

IN RE: MAURICE M.

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Blackwell,

JJ.

Dissenting opinion by McAuliffe, J. in which Rodowsky, J., joins as to Parts I through II.

Filed: December 19, 1988

McAuliffe, J., dissenting.

I.

When Maurice M. was three months old he was admitted to Francis Scott Key Medical Center for treatment of a fractured left leg. X-rays disclosed that he had previously suffered fractures of the right humerus, right scapula, and glenoid. Examination disclosed a right arm weakness, possibly attributable to a brachial plexus injury. Hospital birth records showed no indication of birth trauma. Nurses and others observing Maurice's mother at the hospital reported behavior changes, as well as inappropriate conduct toward the child, including shaking him and dropping him into his crib when he was in a spica cast. The Baltimore City Department of Social Services (DSS) was notified of the suspected child abuse and, after investigation, filed a petition with the Circuit Court for Baltimore City, sitting as the juvenile court (the juvenile court), alleging that Maurice was a child in need of assistance (CINA). The juvenile court promptly ordered continuing shelter care, and granted DSS authority to place Maurice in foster care. Six months later the court found that Maurice was a CINA and placed him under an order of protective supervision with DSS. DSS, acting pursuant to specific authority granted by the juvenile court and pursuant to authority granted it under the

order of protective supervision of the child, placed Maurice with his mother under a carefully structured agreement. Among other things, the mother agreed to cooperate with DSS, attend parenting classes, utilize the assistance of a parent aide provided by DSS, and refrain from corporal punishment of the child.

Eight months later, on April 18, 1988, DSS informed the court that the mother had ceased cooperating with it, had failed to make appropriate use of the parent aide, and had failed to attend parenting classes as required. Additionally, DSS informed the court that Maurice's father had been killed, and that the mother refused to produce the child or tell DSS representatives where he was. DSS feared for the safety of the child because of the above facts, the history of child abuse in the case, the mother's known use of drugs and current threats to kill herself, and the fact that Maurice had last been seen on March 23, 1988, and could not be located by either DSS or the police. Accordingly, DSS asked the court to immediately order the mother to produce the child. The DSS petition and a show cause order were served on the mother, but she did not appear for the scheduled hearing. The court issued an attachment for the person of the mother, and she was taken into custody. In answer to questions of the court psychiatrist, and in an unsworn statement made in open court, the mother said she had sent

Maurice to Texas for a visit with the mother's sister. At the hearing of April 28, the mother refused to produce the child or to inform anyone in authority of his whereabouts. She was thereupon held in contempt and ordered confined in the Baltimore City Jail until she purged the contempt by "either producing the [child] before the court, or revealing to the court[1] his exact whereabouts."

The majority holds that under these circumstances the mother cannot be required to produce the child. I respectfully disagree.

II.

The thrust of the juvenile court's order was to require the mother to produce the child. That the order also contained alternative methods by which the mother could purge the civil contempt does not serve to implicate the Fifth Amendment if it is not implicated by the order to produce the child. As the juvenile judge made clear on several occasions, the juvenile court had determined that the child must be returned to shelter

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[1]A later paragraph in the order provided that furnishing information of Maurice's whereabouts to DSS or to the Baltimore City Police Department would also serve to purge the contempt.

care,[2] and the mother was being ordered to produce and surrender the child for that purpose. The other methods of compliance offered by the court provided the mother with alternatives conceivably more convenient for her, but they were in no way compulsory. The mother could have purged, and can now purge, the contempt and secure her release by producing, or publicly or privately arranging for the production of, the child. Thus, it is the order to produce the child that is at issue here, and without discussing whether the result would be different if the order contained only a command to divulge the whereabouts of the child, I examine the impact of the Fifth Amendment upon the judicial command to produce the child.

III.

As the majority opinion makes clear, the proper reach of the privilege against compelled self-incrimination extends beyond the spoken word. A person acceding to a court order to produce his records makes a silent statement when he does so: "these are my records, and I have sufficient current control or dominion over them to bring about their production." See Doe v.

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[2]As a result of the hearing of April 20, 1988, at which the mother did not appear, and on recommendation of the juvenile master, shelter care was ordered to DSS. No appeal was taken from that order.

United States, 487 U.S. , 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988) (Doe II); Braswell v. United States, 487 U.S. , 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988); United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 1243 n. 13, 79 L.Ed.2d 552 (1984) (Doe I); Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968). By publicly producing a child in response to the court order to produce Maurice, his mother would implicitly represent that: 1) the child produced is Maurice, and 2) she xxxxxx currently has sufficient control and dominion over Maurice to be able to produce him. Each of these implicitly asserted facts might be used against the mother in a criminal prosecution if the physical person of Maurice shows evidence of additional abuse. However, not all testimonial communications rise to a level of Fifth Amendment significance. An implicit assertion that communicates information may, under the circumstances of a particular case, represent little more than a "foregone conclusion," or may be "self-evident," or "a near truism," and therefore be of "minimal testimonial significance." Fisher v. United States, 425 U.S. 391, 411-12, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976)[3]. In discussing the problem of testimonial

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[3]Compare the earlier language of Albertson v. SACB., 382 U.S. 70, 81, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965), that "[t]he judgment as to whether a disclosure would be 'incriminatory' has (Cont.).

assertions implicit in the compelled production of doquments, Professors Whitebread and Slobogin have observed:

> The act of producing documents should always be seen as "testimony" concerning the existence and location of the documents, even if only "minimally" so, because it provides information beyond mere identification. Whether the Fifth Amendment can be asserted to bar their production should depend solely upon how incriminating these admissions are. ... [T]his determination should entail an assessment of the extent to which the facts of existence and location (and, if relevant, authenticity and possession) are "foregone conclusions" which could be proven without using the implied admissions.
> C. Whitebread and C. Slobogin, Criminal Procedure, § 15.06 at 354.

In determining whether the protections of the Fifth Amendment are implicated in the compelled production of this child, it is important to bear in mind that potentially incriminating information may come from two sources. First, there is the information that may be obtained from an examination of the person of the child. That information, which may turn out to be powerfully incriminating if there is evidence of recent abuse, is simply not within the protection of the Fifth Amendment -- it is real and physical evidence and not testimonial evidence. United States v. Mara, 410 U.S. 19, 93

(Cont.)
never been made dependent on an assessment of the information possessed by the Government at the time of interrogation...."

S.Ct. 774, 35 L.Ed.2d 99 (1973); United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

Second, there is testimonial evidence in the form of assertions implicit in the act of production; and it is these assertions, as potentially protected communications, which we must examine in light of the particular facts of this case. The first of these is the identification of the child. Under the facts here present, it is virtually certain that proof of identity exists and can be readily presented by the State without the necessity of any implied voucher by the mother. Putting aside the question of identification by modern scientific comparison techniques, or the probable identification by neighbors or photographs,[4] it can hardly be doubted that positive identification could be established by comparison of current and previous x-rays. The number of documented fracture sites in the body of this two-year old child virtually guarantees identification. The potentially incriminating

[4]The record discloses that the State possesses at least one photograph of Maurice.

authentication becomes a matter of minimal importance in the context of this case.

The second and final testimonial assertion is that the mother currently has sufficient dominion and control over the child to be able to produce him. This, she says, could incriminate her should there be evidence of recent abuse. Again, I think the potential for incrimination[5] is more theoretical than real, and may not rise to the level of constitutional significance within the meaning of the Fifth Amendment.

The criminal charges reasonably feared in this case are child abuse, and possibly murder or manslaughter. Proof that the mother had actual dominion or control over the child at the time he was produced furnishes no evidence of who had physical custody of the child when criminal acts were committed, or who committed them. Moreover, it is self-evident that the mother had the right of day-to-day control over Maurice from the time

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[5]The child's attorney argues that the mother has it within her power to gain her release without publicly producing Maurice, xxxx thereby avoiding the implication of recent control. By arranging to have information of Maurice's whereabouts conveyed anonymously to DSS or to the police, Maurice could be located, and upon Maurice's appearance, the mother would have to be released. Because I prefer to address the question of the impact of this testimonial implication head-on, I make no comment on the validity of this argument.

he was placed with her by DSS until shelter care was again ordered. Although the establishment of control at the time of production might furnish a fact of assistance in the creation of a permissive inference of continuous control, that is not an essential element of proof in the criminal charges which might reasonably be predicted. Additionally, the mother had on at least two occasions freely admitted her continuing control of the child at the very times she was required to produce him. Given these admissions, at least one of which was made through her attorney, it is difficult to see how evidence of control resulting from the production of the child would have much, if any, incriminating value.

IV.

I would not, however, rest the decision in this case upon a determination that the actual incriminatory value of the testimonial assertions implicit in production of the child is so limited as to be outside the protection of the constitutional privilege as a matter of law. Rather, having identified the limited testimonial assertions involved, and having distinguished them from the potentially powerful but constitutionally unprotected incriminating physical facts that may accompany production, I would weigh the incriminatory value of the implicit assertions against the State's legitimate and

nonprosecutorial interest in the welfare of the child to determine whether the assertions rise to the level of constitutional protection. Put another way, in evaluating the true incriminatory weight of the implicit assertions to determine whether they are constitutionally significant, I would consider all relevant circumstances, including the significant societal interest in the welfare of the child.

Factoring the matter of societal interest into the equation for determining whether the testimonial effects of a compelled production shall be deemed to be within the protection of the Fifth Amendment is not a new concept. In Albertson v. SACB., 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965), the Supreme Court compared the compulsion involved in completing an income tax return as discussed in United States v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed 1037 (1927), with the compulsion involved in filing a registration statement as a member of the Communist Party:

> In Sullivan the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime.
> Albertson, 382 U.S. at 79.

The following analysis and parsing of that language of Albertson is instructive:

> This passage announces three inquiries to be made in determining whether a statutory request for information compels incrimination contrary to the respondent's Fifth Amendment rights:
>
> (1) Is the statute directed at a selective group?
>
> (2) Is that group inherently suspect of criminal activity?
>
> (3) Does the statute deal with an area of the law permeated with criminal statutes?
> C. Whitebread and C. Slobogin, Criminal Procedure, § 15.05 at 341.

Understandably, the Albertson test has been applied narrowly. See, e.g. Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968); Grosso v. United States, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968); Marchetti v. United States, supra. In California v. Byers, 402 U.S. 424, 91 S.Ct. 1535, 29 L.E.2d 9 (1971), Chief Justice Burger stated in the plurality opinion that:

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the

> other; neither interest can be treated lightly.
> 402 U.S. at 427.

Justice Harlan, concurring in the judgment, and particularly addressing the question of whether a grant of use immunity was required to constitutionally compel the completion and filing of income tax returns, wrote:

> Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute. To hold otherwise would, it seems to me, embark us on uncharted and treacherous seas. There will undoubtedly be other statutory schemes utilizing compelled self-reporting and implicating both permissible state objectives and the values of the Fifth Amendment which will render this determination more difficult to make.
> 402 U.S. at 458.

More recently, in Braswell v. United States, supra, the Court grappled with the impact of the Fisher — Doe II recognition of potentially protected testimonial assertions in the production of documents upon the earlier line of cases which generally removed documents of collective entities from Fifth Amendment protection. Recognizing that the act of production by a named officer of the corporation would necessarily produce implicit testimonial assertions of authenticity and control, and that

such assertions had some potential to incriminate, the Court weighed a number of factors to determine whether the assertions were entitled to constitutional protection. In deciding that the assertions would be "deemed not to constitute self-incrimination," the Court considered the effect that a contrary decision would have upon the Government's strong interest in prosecuting certain criminal activity:

> We note further that recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute "white-collar crime," one of the most serious problems confronting law enforcement authorities. (footnote omitted).
> Braswell, 108 S.Ct. at 2294.

Applying the teaching of Albertson and its progeny to the facts of this case persuades me that the statutory requirement of production, rooted as it is in the strongest possible public policy in favor of protecting children, clearly outweighs the limited cost of denying the application of the privilege to the testimonial assertions flowing from the act of production in this case. Section 3-814(c) of the Courts and Judicial Proceedings Article, Maryland Code (1974, 1984 Repl. Vol.), which deals generally with children taken into custody, mandates the production of the child in these words:

> If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ

> of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt.

Although this portion of the statute may constitute no more than a declaration of the implicit or inherent authority of a juvenile court with regard to children who have been taken into custody and then placed with parents or others during continued court jurisdiction,[6] its existence gives clear notice to those who accept placement of children under such circumstances.

Although § 3-814(c) fairly may be said to be directed at a selective group, i.e., parents, guardians, and custodians who accept placement of juveniles in custody, that group clearly is not "inherently suspect of criminal activity." Nor does the statute deal with an area of the law "permeated with criminal statutes" within the meaning of Albertson and Byers. Certainly, there are criminal statutes dealing with child abuse and with contributing to the delinquency of minors, but the thrust of the juvenile laws of this State is not criminal, but protective. Maurice was taken into custody for his protection. Every effort of the juvenile court and DSS has been to further the best interests of the child and, if possible, to reunite him with his

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[6] I need not, and expressly do not, consider whether the legislature intended § 3-814(c) to have a broader reach.

mother. Even in the face of evidence of child abuse, no criminal charges were brought. Viewing the entire history of this case in perspective, it cannot rationally be suggested that the motive of DSS in seeking a court order for the production of Maurice was to gain evidence for use in a criminal prosecution. Make no mistake, if Maurice's condition suggests he has been the victim of additional abuse, the State will no doubt conduct a full investigation, and if warranted, prosecute the offender. But there are two entirely different matters involved here. This is not a case of a request for production that is simply part of a criminal investigation. This is an order for production issued by the juvenile court as a necessary part of an ongoing child protection case. Criminal prosecution, if it occurs at all, would be entirely collateral to that major objective.

The gist of the Albertson — Byers principle is that a common-sense approach to the application of even the most important constitutional rights is appropriate. In a case like the one before us, where the incriminatory value of the testimonial component of production is, in xxxx light of all the circumstances and known facts, slight, and the statutory mandate for production is strong and deeply rooted in important and traditional state interests, it does no violence to the Fifth Amendment to require the mother to produce the child.

V.

As an alternative ground for affirming the action of the juvenile court, I would hold that the mother waived her right to exercise the privilege as to the testimonial component of production when she assumed custody of the child from the State.

In Braswell, the Court quoted from Justice Brennan's concurring opinion in Fisher that "one in control of the records of an artificial organization undertakes an obligation with respect to those records foreclosing any exercise of his privilege." 108 S.Ct. 2292. The Braswell Court, at 108 S.Ct. 2291 and 2289, also quoted from Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed 771 (1911):

> [B]y virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection. Wilson, 221 U.S. at 382.
>
> * * *
>
> The [State's] reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion.... [T]he visitatorial power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian.
> Id. at 384-85.

If the visitatorial rights of the State with respect to the records of a corporation are sufficiently important to require that a person assuming custody over them does so with knowledge that the State's right of access will overcome the custodian's privilege regarding the act of production, how much greater must the State's rights be with respect to a child over whom it is exercising control? Moreover, the waiver of the right to avoid production, implicit in the case of custodians of collective entity records, was much more explicit here. The State had demonstrated its interest in, and power over, the child by taking him from the mother and imposing continuing protective custody. The State "placed" the child with the mother, reserving protective supervision and imposing specific conditions on the placement, including the express agreement of full cooperation. I have no hesitancy in concluding that this mother, as would any other person assuming conditional custody of a child from a state under these circumstances, waived her right to claim the privilege as to testimonial assertions implicit in the act of production of the child, and may not now frustrate return of the child to the State's protective custody.

CONCLUSION

I would affirm the judgment of the juvenile court. Although the period of confinement that the State may impose upon the mother for a constructive civil contempt is subject to limitation by the Eighth Amendment's prohibition against cruel and unusual punishment, and perhaps as well by the Due Process Clauses of the federal and state constitutions, no suggestion has been made that the constitutional limitation has been exceeded in this case.

Judge Rodowsky joins in Parts I through IV of this opinion.

MANDATE

RECEIVED DEC 20 1988

Court of Appeals of Maryland

No. 50 , September Term, 19 88

IN RE: MAURICE M.

Appeal from the Circuit Court for Baltimore City pursuant to certiorari to Court of Special Appeals.
July 19, 1988: Received letter from Attorney General's Office requesting confidential information should not be used in oral argument.
December 19, 1988: Judgment of the Circuit Court for Baltimore City vacated; case remanded to that court with directions to order Jacqueline Bouknigh released from custody. Mandate to issue forthwith; costs to be paid by the Mayor and City Council of Baltimore Opinion by Murphy, C.J. Dissenting opinion by McAuliffe, J., in which Rodowsky, J., joins as to Parts I and IV.

OVER

STATEMENT OF COSTS:

In Circuit Court:

Record

Stenographer's Costs $554.80

In Court of Appeals:

Petition Filing Fee	$ 30.00
Printing Brief for Appellant	67.20
Portion of Record Extract — ~~Appellant~~x Joint	1,070.40
Reply Brief	
Appearance Fee — Appellant	10.00
Filing Fee on Appeal (Court of Special Appeals)	50.00
Printing brief for appellee (State)	264.00
Printing Brief for Appellee (Legal Aid)	216.00
Portion of Record Extract — Appellee	
Appearance Fee — Appellee	20.00
	$1,727.60

STATE OF MARYLAND, ss:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals this nineteenth *day of* December *, 19* 88

Clerk of the Court of Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

CONTINUED:

December 19, 1988: State's emergency motion for stay of mandate and stay of judgment and request for immediate consideration filed.
December 19, 1988: Order of Court denyirg above motion.

APPENDIX C

IN RE: MAURICE M.	*	In the
	*	Court of Appeals
	*	of Maryland
	*	No. 50
	*	September Term, 1988

O R D E R

Upon consideration of the State's Emergency Motion For Stay Of Mandate And For Stay Of Judqment And Request For Immediate Consideration filed in the above entitled case, it is this 19th day of December, 1988

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby denied.

/s/ Robert C. Murphy
Chief Judge

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A–494

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES *v.* JACQUELINE BOUKNIGHT

ON APPLICATION FOR STAY

[December 21, 1988]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

The Baltimore City Department of Social Services has asked me to stay the judgment of the Court of Appeals of Maryland in this case, *In Re: Maurice*, No. 50. The Court of Appeals held that her confinement for civil contempt violated the privilege against self-incrimination secured to her by the Fifth Amendment to the United States Constitution. Bouknight is presently incarcerated until she either presents her child, Maurice M., to the Department of Social Services (DSS) or tells where the child can be found. There is no indication that she is unable to comply in one way or the other.

When Maurice was three months old, he was admitted for treatment of a fractured left leg. X-rays disclosed that the child had previously suffered multiple fractures of various other major bones. Nurses and others observing Maurice's mother at the hospital reported her unusual conduct with the child, including shaking him and dropping him into his crib when he was in a cast. Because of the suspicious nature of Maurice's injuries at such a young age, DSS obtained authorization to place the child in foster care. It then filed a petition in the circuit court for Baltimore City seeking a determination that Maurice was a Child In Need of Assistance under Maryland law, Md. Code. §3–801(e) *et seq*. Maurice was found to be such.

By agreement of the parties, Bouknight received custody of Maurice under an order of protective supervision specifying that she accept parenting assistance, attend classes, and refrain from corporal punishment of the child. Some months later, DSS advised the court that Bouknight had ceased cooperating with it, and that she had refused to produce the child or tell DSS where he was. DSS feared for Maurice's safety because Bouknight was not complying with the court order, because of her history of child abuse, because of her known use of drugs and current threats to kill herself, and because Maurice had not been seen for nearly a month and could not be located by DSS or the police.

Bouknight did not attend the hearing set to consider these representations, but was later arrested and ordered to disclose the whereabouts of Maurice. After giving a false answer, she was jailed until she purged herself of contempt by either producing Maurice or revealing his location.

The Court of Appeals of Maryland granted certiorari and heard the case without decision by the state intermediate appellate court. It found that the terms of Bouknight's confinement violated her privilege against compulsory self-incrimination. Noting that some acts of production have been found testimonial, see *United States* v. *Doe*, 465 U. S. 605 (1984), it concluded that the act of producing Maurice would necessarily admit a measure of continuing control over the child which might be relevant in a subsequent criminal prosecution. That risk, it thought, was so substantial that it could not be outweighed by any governmental interest in finding Maurice. Two judges dissented. They argued that there were no testimonial components to compliance with the civil contempt order; that if there were, they were clearly outweighed by the public interest in protecting children from abuse; and that Bouknight had waived any Fifth Amendment privilege against disclosing Maurice's whereabouts when she accepted conditional custody of the child from the city.

In my opinion DSS meets the requirements we have established for the issuance of a stay. See *Rostker* v. *Goldberg*, 448 U. S. 1306 (1981) (BRENNAN, J., Circuit Justice); *Cali-*

fornia v. *Riegler*, 449 U. S. 1319, 1321 (1981) (REHNQUIST, J., Circuit Justice). First, the decision of the Court of Appeals of Maryland is unquestionably based on the United States Constitution. Second, I think the balance of equities favors the granting of a stay. There is undoubtedly a burden on Bouknight's liberty caused by her confinement, but against it must be weighed a very real jeopardy to a child's safety, well being and perhaps even his life. There is hard evidence in this case suggesting Bouknight has abused Maurice in the past and may well do so again. If she is permitted to go free, DSS may not have an alternative means of obtaining information about the child or of locating the child.

Finally, I conclude that it is likely that four Justices of this Court will vote to grant certiorari in this case, and that DSS has a fair prospect of persuading a majority of the Court that the decision of the Court of Appeals of Maryland was erroneous. Of the claims made in the application to me, I think two fit this category. The first is an important question about whether acts—such as the act of production of Maurice on the part of Bouknight—would constitute testimony for purposes of the Fifth Amendment. See *United States* v. *Doe*, 465 U. S. 605 (1984); *Fisher* v. *United States*, 425 U. S. 391, 411–412 (1976); *Schmerber* v. *California*, 384 U. S. 757 (1966).

Second, and in my view equally as important, is whether even assuming there is a testimonial element in the act of surrendering Maurice, the Fifth Amendment privilege is available in this situation. In *California* v. *Byers*, 402 U. S. 424 (1971), we upheld a California law making it a crime to leave the scene of an auto accident without giving one's name and address. In that case we recognized that "[t]ension between a State's demand for disclosures and the protection of the right against self-incrimination" must "[i]nevitably . . . be resolved in terms of balancing the public need on the one hand, and the individual claim of constitutional protections on the other." *Id.*, at 427 (Burger, C. J. plurality). This plu-

rality found it significant that the law "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities," *Id.*, at 430, and was not aimed at a "highly selective group inherently suspect of criminal activities." *Id.*, at 430, quoting *Albertson* v. *SACB*, 382 U. S. 70, 79 (1965).

"Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute." *Id.*, at 458 (Harlan, J., concurring in the judgment.)

In *New York* v. *Quarles*, 467 U. S. 649 (1984) we recognized a public safety exception to the usual Fifth Amendment rights afforded by *Miranda* v. *Arizona*, 384 U. S. 436 (1984), so that police could recover a firearm which otherwise would have remained in a public area. In the present case, a citation for civil contempt in order to obtain the production of a child such as Maurice M. or knowledge about his whereabouts, is not essentially criminal in nature and aims primarily at securing the safety of the child. Protecting infants from child abuse seems to me to rank in order of social importance with the regulation and prevention of traffic accidents.

The state has offered to file a petition for certiorari within 35 days. The stay requested is therefore granted, pending consideration of a timely petition for certiorari and disposition of the same by the Court. If the petition is granted, the stay shall remain in effect until the Court disposes of the case or otherwise orders.

Supreme Court of the United States

No. A-494

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
Applicant,

v.

JACQUELINE BOUCHIGHT

ORDER

UPON FURTHER consideration of the application for stay and the responses filed thereto,

IT IS ORDERED that the stay heretofore entered by the undersigned on December 19, 1988, be and the same is hereby continued pending the filing of a petition for writ of certiorari on or before January 23, 1989. If the petition is filed on or before January 23, 1989, this order is to continue in effect pending this Court's action on the petition for writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this order is to remain in effect pending the issuance of the mandate of this Court.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 21st
day of December, 1988

A true copy JOSEPH F. SPANIOL, JR.
Test:
Clerk of the Supreme Court of the United States
By [signature]
Chief Deputy

APPENDIX E

MATTER OF Maurice M. : IN THE
: CIRCUIT COURT
: FOR
: BALTIMORE CITY
: DIVISION FOR JUVENILE CAUSE
8804202

ORDER OF PROTECTIVE SUPERVISION

An Adjudicatory Hearing was held in this matter on the 14th day of April, 1987.

A Dispositional Hearing was held in this matter on the 18th day of August, 1987. At that Hearing, this Court found that the Respondent is a Child in Need of Assistance.

The Parties having agreed to the following Disposition, it is this 18th day of August, 1987 by the Circuit Court for Baltimore City, Division for Juvenile Causes,

ORDERED that the Respondent be placed under an Order of Protective Supervision to the Department of Social Services of Baltimore City (BCDSS) FOR PLACEMENT WITH MOTHER.

IT IS FURTHER ORDERED that:

BCDSS SHALL SUBMIT PROGRESS REPORTS EVERY 6 MONTHS

MOTHER SHALL COOPERATE WITH BCDSS

MOTHER SHALL CONTINUE IN THERAPY UNTIL DISCHARGED

MOTHER SHALL ATTEND CENTER FOR INFANT STUDIES AT U. OF MD UNTIL DISCHARGED

Page 1 of 2

MOTHER SHALL CONTINUE TO UTILIZE SERVICES OF PARENT AID AS PROVIDED BY DSS

MOTHER SHALL REFRAIN FROM PHYSICALLY PUNISHING THERESA

IT IS FURTHER ORDERED that a Review Hearing shall be held in this matter on MA

The Parties by their signatures acknowledge that the each waive any right to note an exception to immediate passag of this Order.

JACKELYN BOWEN, Attorney for DSS

LEONARD M SCHWARTZ, Attorney for Child

ROBIN PARSONS, Attorney for Parent

And all subject to the further Order of the Court.

RECOMMENDED ON 8/18/87

BY: Joyce F Miller
MASTER

W Kenneth Laura Johnson
JUDGE

APPROVED AS TO FORM AND CONTENT:

Jacqueline Bowen
ATTORNEY FOR DEPARTMENT OF SOCIAL SERVICES OF BALTIMORE CITY

Leonard M Schwartz
ATTORNEY FOR CHILD

[illegible]
ATTORNEY FOR ~~PARENT~~ MOTHER

CIRCUIT COURT FOR BALTIMORE CITY
TRUE COPY
1988

Sandra E. Banks
CLERK

by Janet Easton
Deputy Clerk

Page 2 of 2

IN THE MATTER OF : IN THE
MAURICE M : CIRCUIT COURT
: FOR
: BALTIMORE CITY
: DIVISION FOR JUVENILE CAUSES
PETITION NO.: 88704202

ORDER TO SHOW CAUSE

Upon consideration of the aforegoing Motion for Contempt and Petition for the Issuance of an Order to Show Cause, it is this 26 day of April, 1988, by the Circuit Court for Baltimore City, Division for Juvenile Causes,

ORDERED that JACQUELINE BOUKNIGHT, Mother of the Respondent infant, show cause at an immediate hearing ~~on April 20, 1988 at 1:00 P.M.~~ after arraignment before JUDGE EDWARD J. ANGELETTI, why the relief sought therein should not be granted, provided that a copy of the Motion for Contempt and Petition for the Issuance of an Order to Show Cause, and this Order be served on JACQUELINE BOUKNIGHT, Mother, ~~at or before the immediate hearing on this matter~~. as soon as possible.

151 Edward J. Angeletti
JUDGE

E- 000173

by Janet Easton, Deputy Clerk

IN THE MATTER	:	IN THE
OF	:	CIRCUIT COURT
MAURICE M_____	:	FOR
	:	BALTIMORE CITY
	:	DIVISION FOR
	:	JUVENILE CAUSE
	:	PETITION NO.:
	:	88704202

: : : : :

O R D E R

Upon the petition of the Baltimore City Department of Social Services, JACQUELINE BOUKNIGHT, mother of the infant Respondent, MAURICE M was required to produce him before the court. A hearing was held and after the refusal of Bouknight to present the court with accurate verifiable information as to the whereabouts of said Respondent, it is hereby

ORDERED this 28th day of ~~May~~ April, 1988, by the Circuit Court for Baltimore, Division for Juvenile Causes, that:

1. Jacqueline Bouknight, mother of Respondent is found in contempt of the order of this court for failing to produce him before the court or to reveal his exact whereabouts, and

2. Jacqueline Bouknight shall be confined in the custody of the Warden, Baltimore City Jail without bail until such time that she purges herself of contempt by either producing the Respondent before the court or revealing to the court his exact whereabouts, and

3. Jacqueline Bouknight may purge herself at anytime by providing said Respondent or information

about him to the Baltimore City Department of Social Services or the Baltimore City Police Department in addition to this court.

David B. Mitchell
DAVID B. MITCHELL
JUDGE

Copy of Order to:

Marilyn Blimline, Esquire (DSS)
Lisa Mark Watts, Esquire (LAB)
Robin Parsons, Esquire (OPD)

CIRCUIT COURT FOR BALTIMORE CITY
TRUE COPY

Sandra E. Banks
CLERK
by James L. Banks, Deputy Clerk

APPENDIX F

ANNOTATED CODE OF MARYLAND

COURTS AND JUDICIAL PROCEEDINGS

§ 3-801. Definitions.

* * *

(e) *Child in need of assistance.* — "Child in need of assistance" is a child who requires the assistance of the court because

(1) He is mentally handicapped or is not receiving ordinary and proper care and attention, and

(2) His parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and his problems provided, however, a child shall not be deemed to be in need of assistance for the sole reason he is being furnished nonmedical remedial care and treatment recognized by State law.

§ 3-802. Purposes of subtitle.

(a) The purposes of this subtitle are:

(1) To provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of this subtitle; and to provide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest;

(2) To remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior;

(3) To conserve and strengthen the child's family ties and to separate a child from his parents only when necessary for his welfare or in the interest of public safety;

(4) If necessary to remove a child from his home, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents;

(5) To provide judicial procedures for carrying out the provisions of this subtitle.

§ 3-814. Taking child into custody.

* * *

(c) If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt. (An. Code 1957, art. 26, §§ 70-9, 70-10; 1973, 1st Sp. Sess., ch. 2, § 1; 1974, ch. 691, § 6; 1975, ch. 554, §§ 1, 3.)

§ 3-815. Detention and shelter care prior to hearing.

* * *

(b) If a child is taken into custody, he may be placed in detention or shelter care prior to a hearing if:

(1) Such action is required to protect the child or person and property of others;

§ 12-303. Appeals from certain interlocutory orders.

A party may appeal from any of the following interlocutory orders entered by a circuit court in a civil case:

* * *

(3) An order:

(x) Depriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order. (An. Code 1957, art. 5, §§ 1A, 3, 7, 8A, 20A, art. 7, § 15; 1973, 1st Sp. Sess., ch. 2, § 1; 1975, ch. 349; 1984, ch. 255.) (Supp. 1988).

§ 12-701. Stays.

* * *

(b) *Court sitting as a juvenile court.* — An appeal from the judgment of a juvenile court, including the District Court, in the exercise of its juvenile jurisdiction in Montgomery County, and with respect to a child, does not stay the final judgment appealed from, nor does it discharge the child from custody of a person, institution, or agency to whose care the child was committed by the court. The appellate court may authorize a stay, on application and hearing, if it finds that suitable provision is made for the care and custody of the child. (An. Code 1957, art. 5, §§ 11, 24, art. 26, §§ 70-25, 87; 1973, 1st Sp. Sess., ch. 2, § 1.)

Rule 906. Right to Counsel.

a. *In All Proceedings — Appearance of Out-of-State Attorney.*

The respondent is entitled to be represented in all proceedings under this Chapter by counsel retained by him, his parent, or appointed pursuant to the provisions of subsection b 2 and 3 of this Rule. An out-of-state attorney may enter his appearance and participate in a cause only after having been admitted in accordance with Rule 20 of the Rules Governing Admission to the Bar of Maryland (Special Admission for Out-of-State Attorneys). Once so admitted, his appearance and participation is limited by the restrictions of that Rule.

Rule 911. Masters.

a. *Authority.*

1. Detention or Shelter Care.

A master is authorized to order detention or shelter care in accordance with Rule 912 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

2. Other Matters.

A master is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the court.

Rule 8-122. APPEALS FROM PROCEEDINGS FOR ADOPTION OR GUARDIANSHIP — CONFIDENTIALITY

(a) Scope. — This Rule applies to an appeal from an order relating to a child in a proceeding for adoption or for guardianship with right to consent to adoption or long-term care short of adoption.

(b) Caption. — The proceeding shall be styled "In re Adoption/Guardianship No. ..... in the Circuit Court for ....."

(c) Confidentiality. — The last name of the child, the natural parents of the child, and the adopting parents shall not be used in any opinion, oral argument, brief, record extract, petition, or other document pertaining to the appeal that is generally available to the public. The parties, with the approval of the appellate court, may waive the requirements of this section.

(d) Transmittal of Record. — The record shall be transmitted to the appellate court in a manner that ensures the secrecy of its contents.

(e) Access to the Record. —

(1) *Adoption Proceeding.* — Except by order of the Court and subject to reasonable conditions and restrictions imposed by the Court, the record in an appeal from an adoption proceeding shall be open to inspection only by the Court and authorized court personnel.

(2) *Guardianship Proceeding.* — Except by order of the Court, the record in an appeal from a guardianship proceeding shall be open to inspection only by the Court, authorized court personnel, parties, and their attorneys.

THE JOHNS HOPKINS UNIVERSITY
SCHOOL OF MEDICINE

ERROL L. BENNETT, M.D.
Assistant Professor

Please address reply to
FRANCIS SCOTT KEY
MEDICAL CENTER
Department of Orthopaedic Surgery
4940 Eastern Avenue
Baltimore, Maryland 21224
(301) 955-6453

March 3, 1987

Ms. Denise Ippolito
Social Worker
Protective Services
312 East Oliver Street
Baltimore, MD 21202

RE: Maurice M.
FSK#: 84-73-51

Dear Ms. Ippolito:

Maurice M. was admitted to Francis Scott Key Medical Center on 1/23/87 suffering from a fracture of the left femur. His mother stated that she fell while holding the child and he injured himself in this fashion.

On examination, it was found that he had a left femur fracture shown on x-ray which was treated in skin traction. A physical survey was performed on 2/4/87 revealing fractures in various stages of healing effecting the right humerus, right scapula and glenoid. Films done at the Johns Hopkins Hospital at age 2 months when this child was admitted for pneumonia indicated the presence of these fractures also. There is no evidence of birth trauma in the medical records from the Francis Scott Key Medical Center, and there are reported incidents which occurred while in the hospital where the mother apparently ill-treated the child while visiting. The child was also noted to have inability to move his right upper extremity, and neurologic consultation was obtained with a view to determine whether or not this was a brachial plexus injury, root avulsion or some form of birth palsy. The patient was referred to Pediatric Neurology at Johns Hopkins Hospital; an appointment is scheduled for 3/9/87.

My concern about Maurice is that it is most unusual for a 3 month old to have long bone fractures, and even more unusual for them to have multiple fractures involving different limbs and the flat bones of the appendicular skeleton as well. The suspicion that this is the result of some form of child abuse is very high and I am concerned that this child may suffer serious or fatal injuries if the conditions leading to this form of abuse are not corrected.

I hope that this will answer your questions. If there is any further information that you may need, please contact me.

Sincerely,

Errol L. Bennett, M.D.,
Assistant Chief of Orthopaedics
Francis Scott Key Medical Center

Assistant Professor, Orthopaedic Surgery
Johns Hopkins University, School of Medicine

ELB/mls

FRANCIS SCOTT KEY MEDICAL CENTER

DISCHARGE SUMMARY

NAME: M____ MAURICE	ADMITTED: 1-23-87	DISCHARGED: 2-10-87
NUMBER: 084-73-51	SERVICE:	PEDIATRICS
3-month-old black male;	ADMITTING:	T. DORAN
second FSKMC admission.	ATTENDING:	T. DORAN

DIAGNOSIS:
Acute left femur fracture, old; right humeral, scapula and glenoid fracture; rule out child abuse.

BRIEF NARRATIVE OF HOSPITAL COURSE:
BRIEF HISTORY OF PRESENT ILLNESS:
This is the second FSKMC admission for this 3-month-old black male with a left femur fracture. According to Mom, she and an acquaintance had an altercation on 1-19-87. The acquaintance, Angela Myers, supposedly pushed mother who was holding Maurice. Mom then fell backwards, landing on her left side onto a step. Maurice was in Mom's left arm and hit his left side on the step also. Mom claims Angela is a cocaine user whom she has had fights with in the past. Angela supposedly pushed Mom when she was pregnant, almost causing her to "lose her baby." Mom states Angela wants money which she would not give her leading to this incident. After the fall, Maurice cried, but looked alright according to Mom. She decided not to call the doctor, but to watch the baby. She noticed that he did not move his left leg, but was otherwise normal.

On the morning of admission, Mom states Maurice's left leg appeared puffy, tried to call her regular doctor at Johns Hopkins Hospital and when she couldn't reach this doctor, she brought Maurice to Chesapeake Health Plan.

X-ray was positive for left femur fracture. PS was contacted and the case was reported.

Past hospitalizations: 1986, Francis Scott Key, transferred to Johns Hopkins Hospital for Chlamydial pneumonia. No other illnesses or surgeries, no other known accidents or injuries. Immunizations are up to date, has received one series of DPT, OPV. Regular doctor is Dr. Patricia Shearer at Johns Hopkins Hospital.

Birth: Born at Francis Scott Key, 10-3-86, full term vaginal delivery, weight 8 lbs., 6 oz. without complications. No known birth injury and no injuries in old records. Discharged from the nursery in two days. Is on no medications, takes Similac with iron, no known allergies.

FAMILY HISTORY:
Negative for diabetes, heart disease, high blood pressure, lung diseases, no history of asthma, no history of sickle cell disease, no history of osteogenesis imperfecta. Mom is 20 years old, alive, in good health. Dad is 21, alive and in good health. No other children.

continued.....

PHYSICAL EXAMINATION:
Temperature is 99.8, pulse 140, respiratory rate 36, weight 4.92 kilograms. General appearance: Well developed, well nourished black male infant in no acute distress. Skin: Cool, dry without lesions or rashes. Left thigh is swollen without discoloration. Fingers are noted to be long. Head: NC, AT, anterior fontanelle soft and flat. Eyes: PERRLA. Ears: TM's not visualized. Nose: No discharge. Throat: Not injected. Neck: Supple, no lymphadenopathy. Lungs are clear. Heart: Regular rate and rhythm without murmur. Abdomen: Soft, bowel sounds present, no hepatosplenomegaly Musculoskeletal: As noted, the left thigh is swollen, held limply by baby, no spontaneous movement, no gross deformity. No other deformities. Neurovascular examination distally to the left thigh is intact. Pulses 2+ and equal bilateral. Neuro examination: Alert and active without focal findings. Bilateral upper arm weakness and decreased tone.

LABORATOTRY DATA:
Left femur is fractured. Hematocrit 27.5.

HOSPITAL COURSE:
The patient was admitted to A5 Center with the diagnosis of left femur fracture initially. Orthopedic consultation was obtained. The baby was placed in skin traction. Neurovascular checks were done distally q.1.h. times 24 hours and q.4.h. PS as mentioned were contacted. While on A5 Center, the patient received portable x-rays, skin traction placement seemed satisfactory based on x-ray results.

Repeat CBC on 1-25-8 showed white blood count of 5.7 with hematocrit of 28.2 and reticulocyte count of 2.4. Urinalysis was negative. The hematocrit was repeated on 2/2/87 due to suspected blood loss. The result was 32.1 with retic count of 4.6 which was improved.

The patient was seen by Dr. Bennett, pediatric orthopedist, in question to upper arm extremity weakness. Dr. Bennett raised question of brachial plexus injury and suggested neuro consult to be obtained. Dr. Shakra from Neuro, Francis Scott Key, saw patient on 2/5/87 and Dr. Cohen, peds Neuro chief resident from Hopkins, saw patient on 2/8/87. Findings included upper extremity weakness with decreased tone. Differential diagnoses include root avulsion, brachial plexus injury with cord injury. Dr. Cohen's exam showed decreased tone in the arms, proximal worse than distal, right worse than left; also decreased upper extremity movement. He suggested EMG's which were scheduled to be done at Johns Hopkins on 3/9/87 at 1 p.m. and follow up with Pediatric Neurology on 4/1/87 at 2 p.m.

Maurice was placed in a spica cast. On 2/4/87 skeletal survey revealed right humeral, scapular and glenoid fracture as well as old fractures. These fractures were also observed at films done at Johns Hopkins at age two months

continued...

when Maurice was admitted for Chlamydia pneumonia. As mentioned, there is no indication of birth trauma during delivery at Francis Scott Key Medical Center. This information was given to DSS by Ms. Callam, the social worker at Francis Scott Key. While on A5 Center nursing staff has noted behavior changes in mother. Another patient's parents on the floor noted incident where mother shook baby while holding him. She was also observed dropping baby into crib with side rails up. This was when he was in his spica cast.

Physical exam while on A5 Center has remained unchanged. The patient is to be discharged to foster care by DSS on 2/10/87. Follow up with Dr. Doran at Chesapeake Health Plan. Also, as mentioned, follow up with Pediatric Neurology, Dr. Cohen at Johns Hopkins and EMG test to be done. A nerve conduction study was done while on A5 Center by Dr. Bleecker, results of which are pending. A CT without contrast to rule out occult bleed is to be done on 2/9/87, results pending.

DICTATED BY: Glenda Hopkins for G. Hopkins P.A.
GLENDA HOPKINS, P.A.

GH:TL6306422
DD: 2-9-87
DT: 2-9-87

Addendum
CT Scan 3 contrast of the head 2/9/87 revealed no acute bleed; normal CT; Ventricles upper limits of normal

D/C Plans
D/C to DSS custody
Meds: None
F/u: Dr. Doran Chesapeake Health Plan 342-7300 2/17/87 3:30P
Ortho Clinic FSKMC 2/17/87 1:15PM for cast removal
Dr. Cohen Peds Neuro JHH 4/1/87 2:00PM
EMG 3/9/87 JHH 1:00 PM

Patricia Locke PA

28-3357-7927 Rev.

8811-005

ADM 0847351-01-004
1242775 TP
M MAURICE
10/03/86 M

A S C

02 03 87

FRANCIS SCOTT KEY MEDICAL CENTER, INC.

HISTORY AND PROGRESS NOTES

Admitted 11/23/87

Mother - Jacqueline Bouknight

DATE	TIME	
2/3/87	11m	CHP Attending Note:

Maurice N. is a 3 mos old bm admitted to ped 1 3A on a fracture of the (L) femur.

Ms Bouknight stated to me that she was visited by a drug-addicted neighbor while Maurice was in bedroom talking with them. She brought him in for medical care 4 days later at which time he was found to have a fractured femur.

A skeletal survey was subsequently done at which time it was discovered that Maurice had healing fractures of his (R) humerus and (R) scapula & clavicle.

Ms Bouknight could give no explanation for the old fractures, and stated her twins visited that she has "a bullet with his (my) name on it." to nursing personnel.

Maurice will be placed in traction and will have a spica cast placed. He will be followed by orthopedics. There is no need for therapy for the old fractures.

Timothy Dixon MD

-64a-

OVER

JOSEPH M. EISENBERG, PH.D.
PSYCHOLOGIST
804 EAST JOPPA ROAD
PENTHOUSE SUITE M
TOWSON, MARYLAND 21204

JAMES J. SMITH, PH.D.
PSYCHOLOGY ASSOCIATE

(301) 321-9101

PSYCHODIAGNOSTIC EVALUATION

Re:	Jacqueline Louise Bouknight
Date of Evaluation:	July 27, 1987
Reason for Referral:	Psychodiagnostic Evaluation
Tests Administered:	Weschler Adult Intelligence Scale - Revised (Prorated) House-Tree-Person Drawing Test Adult Diagnostic Screening Battery Incomplete Sentences Blank Post Drawing Interview Clinical Interview

Clinical Observations:

Ms. Bouknight was initially resistant to the Evaluation procedures. She did cover her face with her hands and maintained limited eye contact with the examiner.

After some time of prompting and encouragement, she performed all tasks as instructed. There was a need for repeated provision of instructions, since she did not appear to understand the instructions or the questions posed. Consequently, an intellectual assessment was perfomed due to questions about her capacity to function on an intellectual level consistent with her chronological age.

Test Results:

Ms. Bouknight is presently functioning in the Borderline range of intelligence for the Verbal area (IQ 72), but she is functioning in the Low Average range of intelligence in the Performance area (IQ 80). Her overall level of intellectual functioning falls within the Borderline range (Full scale IQ 74).

Her areas of weakness in intellectual functioning are reflected in her general fund-of-information, understanding of her environment and her capacity to relate on a verbal level and her general expressive and receptive fund of English vocabulary. Her areas of strength are noted in

-65a-

her general understanding of her social environment and her ability to do rote tasks.

Emotionally, Ms. Bouknight is significantly immature and insecure. Her level of functioning is more consistent with an age range of 8 to 10 years than her present age of 21 years. She lacks a clear and insightful understanding of the consequences of her behavior and those activities necessary to maintain a constructive and independent lifestyle.

Her level of trust in social situations is markedly reduced and reflective of someone who does not appear to find satisfaction or comfort in close interpersonal contacts. Her dependency needs do not appear to ever have been met to any significant degree and consequently, her reliance upon her social environment as a source of support is limited.

Her expectations for a parent child relationship are unrealistic. She tends to view her child as a source of fulfillment of basic nurturance needs, hers, rather than see her capacity to fulfill the child's needs. Her level of social understanding is below what would be expected based upon her chronological age, even though it is one of her areas of intellectual strength. The interaction between the effect of early childhood experience and her life long pattern of behavior tend to dillute her overall social effectiveness.

Her background does reflect a good deal of instability and turmoil. It also appears to be the source of confusion and dissatisfaction over close interpersonal contacts. Much of her resourcefulness is based upon basic survival rather than the development of sophisticated or relatively fluid social skills and abilities.

She tends to have a fickle and volatile set of expectations for her future that reflect her insecurity and inability to establish a realistic view of life. While she wishes to have her basic needs fulfilled through interpersonal contacts, she is often angry when she finds herself with feelings of insecurity and unmet nurturance needs. The consequence to these feelings is that of inappropriate behavior, anger, and a tendency toward acting out.

Her anxiety is relatively high and is often reinforced by the lack of consistency between her wishes for need of fulfillment and actual consequences of her behavior. When she finds her needs not fulfilled, her anxiety increases, but her socially inappropriate behavior also increases.

There are suggestions within the test data that Ms. Bouknight lacks a genuine capacity for relating to the thoughts and feelings of others. She may be so involved within herself that she cannot truly emphasize and appreciate what others may experience, think, and feel.

Summary and Recommendations:

Ms. Bouknight's overall intellectual development falls within the Borderline range of intelligence. She does show significant in her capacity to appreciate the consequences of her behavior, rely upon an internal fund of information for guiding her behavior, and for implenting behavior that is reflective of critical ability to understand the consequences of her actions.

While she does show some relative strength in her capacity to understand her social situation and rely upon rote skills to complete a task, her emotional issues intercede and dillute the capacities to function on an intellectual level that is at least consistent with her overall cognitive endowment.

Her emotional immaturity and less than stable background does not augur well for her capacity to apply herself constructively and in her best interest. She seeks to have her basic needs fulfilled in such an unrealistic way, that she is left with a sense of frustration and a reinforcement of what transpires when you attempt to have close interpersonal contacts: dissatisfaction, unhappiness, and an overall sense of rejection and pain.

She is not now able to relate constructively to her child, since her child is seen as fulfilling her needs rather than the reverse. She becomes totally frustrated and enraged to find herself unable to gain from her child what she wishes as a replacement for what she lacks in her own childhood. When her frustration mounts, she is likely to act out toward the child and see the child as abusive to her rather than herself as abusive to the child.

Even though, Ms. Bouknight may deny extensive abuse in her own background, some tentative findings suggest that she may in fact have been abused but certainly neglected at the very least. The neglect carries with it a lack of capacity for establishment of emphathetic relationships with others and a need to rely upon self for basic survival. These circumstances are not in a constructive pattern and lead toward inappropriate behavior that is directed toward a frustrating agent, e.g. her child.

It is not recommended that Ms. Bouknight regain custody of her child, since she does not appear emotionally capable of providing the adult protection, nurturance, and care that would be required for the child's safety and security. Rather, Ms. Bouknight is need of intensive and extensive intervention both on an emotional and social level to help her deal constructively with not only her own internal issues but also those requirements for independent and self-sufficient functioning. She needs guidance in the establishment of appropriate limits for herself and others and the means by which she can institute a set of realistic expectations.

These expectations must be oriented toward a constructive view of herself, the world, and what happens when an adult attempts to fulfill her own responsibilities.

The overall approach must be behaviorally oriented and weighted toward "doing" rather than talking about issues. Ms. Bouknight's overall limited intellectual capacity does not lend itself toward a "talking type" therapy but does require behavioral intervention with clearly defined objectives and goals that Ms. Bouknight cannot only understand but appreciate. Further, she also needs to develop a set of reinforcements that she can apply internally and not have to rely upon others.

Her reliance uon others for satisfaction becomes a precursor for frustration and an affirmation of the lack of success and happiness that comes from close interpersonal contacts.

Joseph M. Eisenberg, PH.D.

JME/ral

BOUKNIGHT, Jacqueline

DSS Contacts 8/18/87 through 5/5/88

8/18/87	Disposition Hearing; Child to remain with mother; Order of Protective Supervision; Intake CPS Worker obtains signed consent from Ms. Bouknight to obtain written copy of the Psychologist's report; Family and Children's therapist had a copy but could not give such to the Department on 8-18-87.
8/20/87	Foster Care Worker T/C to Lilly Alston, Income Maintenance. She needs a memo explaining what happened at court so that Ms. Bouknight can start receiving AFDC.
8/25/87	Foster Care Worker T/C from Mrs. Dixon, In-home Aide. Jackie Bouknight is not receiving AFDC yet; In-home Aide H.V. Saw mother and child.
8/31/87	Foster Care Worker T/C to and H.V. with Bouknight. Client requested Similac with Iron formula and diapers for Maurice. Maurice had 104° temperature and she took him to the doctor. Transported mother and child to get a prescription. Client requested a new MA card for Maurice; Foster Care Worker T/C and referral to Emergency Services. Took Ms. Bouknight to 1500 Greenmount - 2nd floor; Foster Care Worker T/C to WIC. WIC requested a letter saying that client applied for Emergency Food Assistance, give client some tokens, have her get a letter from the people she is staying with stating that they are providing housing and some food and have her bring these letters to the WIC office Wednesday morning on Eastern Avenue. Took Mother and child to Sears for clothing.
9/1/87	CPS Worker Appointment letter sent to Ms. Bouknight at 1726 N. Washington Street.
9/4/87	Foster Care Worker T/C from J. Bouknight. Ms. Bouknight said she never came to pick up the forms for WIC and tokens because it was too hot. She wanted me to mail it to her. Mrs. Dixon, In-home Aide, comes every Tuesday morning from 8:30-11:30;
9/4/87	CPS Worker H.V. to Ms. Bouknight and Maurice; Maurice appeared well-fed with good affect and hygiene. Service agreement discussed and signed by Ms. Bouknight.
9/8/87	In-home Aide - H.V. Saw mother and child.
9/15/87	In-home Aide - T/C from J. Bouknight stating Aide not needed today.
10/6/87	In-home Aide - T/C from J. Bouknight stating Aide not needed today.
10/13/87	In-home Aide - H.V. with mother. Child not there.
11/4/87	In-home Aide - H.V.; Saw mother who said not needed today.
11/4/87	F.C. Worker T/C from client and attempted H.V. Ms. Bouknight called and said she had a problem and requested a home visit. She said she knew she had to move in November but she will be moving today as soon as she gets her check. I told her I would be closing her case and that she has a P.S. worker but that I would come out. When I arrived, I was told that her grandfather had just taken her over to Apple's house. He said that he does not like the people she associates with and that one of them stole his T.V. Grandfather's name is John Brown.

11/10/87 In-home Aide - unable to keep scheduled home visit with client.

11/17/87 In-home Aide - Attempted H.V. — no one responded.

11/24/87 In-home Aide - Attempted H.V. — no one responded.

11/25/87 CPS Worker - Attempted H.V. - no one responded.

12/1/87 CPS Worker - Sent appointment letter to schedule H.V. on 12/7/87.

12/7/87 Attempted T/C Contact. CPS Worker unable to keep appointment due to emergency in another case.

12/7/87 CPS worker - T/C contact with F.C. Worker; client reportedly has moved.

12/8/87 In-home Aide - Home Visit with mother; child was not there. Client stated she had moved to another residence and would call. Planned to go shopping next week.

12/10/87 In-home Aide - T/C - child answered the phone and said Ms. Bouknight had just left.

12/14/87 In-home Aide - T/C with Ms. Bouknight. The Aide wanted to schedule a home visit for 12/15/87. Ms. Bouknight declined saying she was planning to see Maurice's father. The Aide had gifts for Ms. Bouknight and Maurice. Ms. Bouknight said she would call and tell her where to bring the gifts.

12/18/87 In-home Aide T/C with Ms. Brown. Was told Ms. Bouknight did not live there anymore.

3/22/88 Informed by D.S.S./P.S. worker, Angela Collins (paternal relative) that Terrance Miles, father, has been shot to death on 3/11/88 at Washington and Lanvale Streets. Both parents alleged to be drug abusers. Ms. Bouknight reported to be wandering about in a daze since the death of Mr. Miles.

All additional contacts were by CPS Worker.

*12/23/87 Attempted H/V by CPS Worker - no response.

2/5/88 Master File Clearance - attempt to locate new address. Old address still listed.

3/23/88: Emergency HV to Ms. Jacqualine Bouknight at 9 a.m. Ms. Bouknight not home. Worker spoke to former foster father of Ms. Bouknight, Mr. John Brown (DOB 5/3/16, SS#249-14-5253), who indicated that he was the principal tenant of 1726 N. Washington Street and that Ms. Bouknight and Maurice were in residence at his home and that he saw Ms. Bouknight and Maurice that morning around 9 a.m. and that both were in good health. Mr. Brown confirmed that Ms. Bouknight was in a daze after the shooting death of Terrance Miles but that she was better and that he would not permit any harm to come to Maurice and that he had been helping Ms. Bouknight with parenting skills.

3/23/88: T/C to Foster Care Worker, Nancy Weaver; was referral source for Ms. Bouknight to Infant Study Program at U of Md. Hospital. Ms. Bouknight had 3 appointments in July and August, 1987. MA to provide transportation to and from hospital.

3/23/88: T/C to Ella Smith of Medical Records of Francis Scott Key Hospital; last appointment for Maurice 5/22/87, check-up, no special concerns noted. Appointment scheduled 9/9/87, no show.

3/23/88: T/C to U of Md. Hospital Infant Study Program, Director, Ms. Gundy (328-6975 or 828-2485 and 828-2750)

3/23/88: T/C to Ms. Barbara McGhee, Intake Specialist, U of Md. Infant Study Program (328-2485)

3/23/88: T/C to Ms. Rose Blum, Secretary, Family & Children's Society; no recent contact by Ms. Bouknight. Counselom, Leslie Morris and Carol Hubbard have left. Case closed on 7/31/87.

3/23/88; AMF clearance on Ms. Bouknight; current address for AFDC grant - 1726 N. Washington Street.

3/23/88: AMF clearance on paternal grandmother, Ms. Florence Dea no current 30 case.

3/23/88: AMF clearance on Terrance M. Miles; last home address - 2230 Gable Avenue, SS#214-76-8970, food stamp case - 30-635 304, case closed 11/1/87.

3/31/88: T/C to Ms. Jacqueline Bouknight (327-8873); no answer.

4/7/88: Unannounced HV to Ms. Bouknight at 1726 N. Washington Street; Ms. Bouknight stated that she was only visiting 1726 N. Washington Street, but that 1726 N. Washington Street was not her current address. Ms. Bouknight would not disclose her current address to worker. Ms. Bouknight would not disclose whereabout of Maurice to worker, even though informed that worker was responsible to court for Maurice.

Ms. Bouknight stated that Maurice is with an aunt, whose name she would not disclose. Ms. Bouknight stated that Maurice was in Baltimore in her care. Ms. Bouknight stated that Maurice was seen at Francis Scott Key Hospital but would not state when.

BOUKNIGHT, Jacqueline

Ms. Bouknight stated she was seeing another counselor but would not disclose her counselor's name or the agency that her counselor was affiliated with.

Ms. Bouknight would not sign service agreement. Ms. Bouknight stated that she didn't care if the court was petitioned as she was not following the provisions of the Order of Protective Supervision. Ms. Bouknight stated that she would get physically violent if her AFDC grant were suspended in the office of Social Services, as the worker explained that income could not go out to a child whose whereabouts were unknown. When questioned why she would not let worker see Maurice or know of his whereabouts, Ms. Bouknight stated, "Social Services likes snatching people's children." That she was tired of being investigated and that I would never see them (meaning Ms. Bouknight and Maurice) again.

4/7/88: Conference with PS Unit Head, Leslie Ogungbemi, who concurred with worker's plan to file emergency court petition and to contact every known relative.

4/7/88: Emergency court review petition filed with Legal Resources person, Fran Burns.

4/7/88: T/C to Ms. Edna Gardner of Chesapeake Health Plan at the FSKH; last appointment by Maurice, 5/22/87; appointment scheduled in September, no show. May have been seen at Garwyn Medical Center (550-0100 or 550-3484).

4/7/88: Unannounced HV to former address of Terrence Miles at 1623 N. Durham Street; message left; no one home.

4/7/88: T/C to Parent Aide Supervisor, Ms. Gloria Dixon (X2076) to forward parent aide report

4/7/88: Attempted t/c to Parent Aide, Joanne Dix (X2075); message left.

4/7/88: T/C to Garwyn Medical Center (945-2200) at 2300 Garrison Boulevard, Baltimore 21216; Ms. Janice Thomas stated Maurice may have been seen by Dr. Francis or Dr. Clinton or Dr. Eric White (624-7800 or 563-4761) at 5240 Old Town Mall.

4/7/88: T/C to Ms. Kathy Ruzin, of Francis Scott Key Hospital; Maurice last seen 8/30/87 for check-up in the ER.

4/7/88: Attempted t/c to Dr. Timothy Doran (550-0967)

4/7/88: Attempted t/c to Dr. Steven Cohen (955-6070)

4/7/88: Attempted t/c to Dr. Patricia Shearer of JHH (342-7300)

4/7/88: T/C to JHH Social Worker, Rose Cariddi (955-8103); last contact with Maurice in 4/87.

4/7/88: T/C to Ms. Florence Dean (675-2683); last saw Maurice in 9/87. Her son, Terrance Miles, was in North Carolina. Ms. Dean confirmed that her son, Terrance Miles, was shot to death on 3/11/88.

4/8/88: T/C to Parent Aide Supervisor, Gloria Dixon; Ms. Bouknight had been addressed before Thanksgiving. Case closed. Parent aide saw Ms. Bouknight in October and November, 1987. Went shopping with Ms. Bouknight. Ms. Bouknight first refused parent aide.

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MAURICE M.,

Petitioner

v.

JACQUELINE BOUKNIGHT,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of January, 1989, one (1) copy of the Petition for a Writ of Certiorari, accompanying Appendices, a Motion to Proceed In Forma Pauperis, and a Motion to Suspend Requirement of a Sworn Affidavit were mailed first class, postage prepaid, to Ralph S. Tyler, III, Esq., Assistant Attorney General, Munsey Building, 2nd Floor, 7 North Calvert Street, Baltimore, Maryland 21202; and George E. Burns, Jr., Esq., Office of the Public Defender, 201 St. Paul Place, Baltimore, Maryland 21202.

Susan Dishler Shubin
Counsel of Record
LEGAL AID BUREAU, INC.
714 East Pratt Street, 7th Floor
Baltimore, Maryland 21202-3105
Telephone: (301) 539-5340

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